



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

Vol. 47, No.5

October 2017

- I. SUBJECT:** USE OF PHOTOGRAPHS FOR IDENTIFICATION PURPOSES – AMENDED OCTOBER 2017
- II. QUESTION:** WHAT TYPES OF PHOTOGRAPHIC IDENTIFICATION PROCEDURES MAY BE USED IN A CRIMINAL INVESTIGATION AND HOW SHOULD THEY BE ADMINISTERED?
- III. ANSWER:** THERE ARE VARIOUS TYPES OF PHOTOGRAPHIC IDENTIFICATION PROCEDURES THAT THE COURTS HAVE FOUND PERMISSIBLE, INCLUDING PHOTO ARRAYS, MUGSHOT VIEWINGS AND SET BOOK VIEWINGS. IN ORDER FOR A PHOTOGRAPHIC IDENTIFICATION TO BE INTRODUCED AS EVIDENCE IN A CRIMINAL OR FAMILY COURT PROCEEDING, NEW YORK STATE LAW REQUIRES PHOTO IDENTIFICATIONS TO BE CONDUCTED USING A “BLIND OR BLINDED PROCEDURE.”
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IV. DISCUSSION:

A. WHY IS THIS BULLETIN BEING ISSUED? – RECENT CHANGES IN THE LAW NOW PERMIT PHOTOGRAPHIC IDENTIFICATIONS TO BE INTRODUCED INTO EVIDENCE BY PROSECUTORS AND IMPROPER PHOTOGRAPHIC IDENTIFICATIONS MAY LEAD TO WRONGFUL CONVICTIONS

Advances in DNA technology have resulted in an increase in the exoneration of individuals who were wrongfully convicted of crimes. As a result there has been a careful study of the reasons these types of convictions may have occurred. In some cases, the evidence that helped lead to a wrongful conviction was a mistaken identification by a victim of, or a witness to, a crime.

In order to help prevent wrongful convictions, the Department has undertaken a series of reforms designed to improve the quality and reliability of photographic identifications. These reforms include a complete overhaul and re-design of the Photo Manager System and the adoption of “best practices” developed by the Department in conjunction with the District Attorneys Association of the State of New York and other New York State law enforcement and criminal justice agencies.

The purpose of this bulletin is to review the basic rules for obtaining photographic identifications in criminal investigations, introduce the concept of blind and blinded procedures, and remind investigators of the significant adverse consequences that can occur from honest, but incorrect identifications.

B. INTRODUCTION

For many years the courts have recognized the important role of photographic identification in law enforcement. However, courts have also recognized that the improper usage/display of photographs for identification purposes can sometimes cause a viewer to make a mistake in identifying a suspect. It is critically important, therefore, that police officers use proper techniques in conducting photographic identification procedures, so that when an identification is made it is made from the memory of the viewer and not some other factor. In 2017, the Criminal Procedure Law¹ was amended to permit the introduction of photographic identifications at trial in criminal and juvenile proceedings as part of the prosecutor’s case-in-chief, provided they are conducted using a blind or blinded procedure.

C. PROCEDURE FOR CONDUCTING PHOTOGRAPHIC IDENTIFICATIONS

1. Blind Procedure - When the investigator administering the procedure does not know which person in the array is the suspect. In other words, a detective not associated with the investigation and who does not know who the suspect is administers the identification procedure.
2. Blinded Procedure - When the investigator administering the procedure may know the identity of the suspect, but does not know where the suspect’s photograph falls within the array being viewed by the victim or witness. This is accomplished by means of what is commonly referred to as the “shuffle method.” Using this method, a case detective creates three separate arrays and the suspect’s photograph is in a different location in each array, each array is placed in a separate sealed envelope, the envelopes are shuffled and the viewer picks one envelope to view. The case detective administering the array must position himself or herself in such a way that he/she does not see the array, but can still fully document the viewer’s comments and reactions during the identification.
3. Confidence Statements - A statement from a viewer immediately following his/her identification regarding his/her confidence level or certainty in the identification. The

¹ Criminal Procedure Law § 60.25, 60.30, 710.30; Family Court Act § 343.3, 343.4.

viewer should be asked to explain, without using any numbers or percentages, how sure he or she is of the identification.

D. TYPES OF PHOTOGRAPHIC IDENTIFICATIONS

There are four basic types of photographic identifications: (1) Photographic Array, (2) Mug Shot Viewing, (3) Set Book Viewing, and (4) Confirmatory Photographic Viewing.

1. Photographic Array – Used when there is a known suspect. Consists of the display of six or more photographs, one of whom is the suspect.
2. Mug Shot Viewing – Used when the suspect is not known. Consists of the display of multiple photographs of individuals with similar physical characteristics to the perpetrator, as described by the victim or a witness to a crime.
3. Set Book Viewing – A collection of six or more photographs of persons who may engage in criminal activity and are: (a) associated with each other (e.g., gang, crew, school, residence); or (b) not associated with each other but who engage in similar criminal activity (e.g., robbery, burglary, larceny-pickpocket, sex offender-transit system). A set book viewing is used when the suspect is not known, but there is some reason to believe that a photograph of a possible suspect is in a set book.
4. Confirmatory Photographic Viewing – Used when the viewer has demonstrated a prior relationship with the suspect. Once a sufficient prior relationship has been determined, a single photograph of the suspect may be shown. If there is any question as to how well the viewer knows the suspect, a photo array should be used.

E. SUGGESTIVENESS IN PHOTOGRAPHIC IDENTIFICATIONS

Although courts recognize the value of photographic identifications in criminal investigations, they acknowledge that even a properly conducted identification procedure (prompt on-the-scene show up, photographic identifications or lineup) will invariably be somewhat suggestive. That is, the viewer may recognize that the police have an idea of who the suspect is, or that individuals who are depicted in photographic identifications have probably had involvement in the criminal justice system in the past. As a result, courts have held that in order to utilize an identification procedure in a criminal investigation or proceeding, the procedure may not be unduly or unnecessarily suggestive. The New York legislature, taking this rule a step further, enacted a law requiring that an identification procedure be conducted in a blind or blinded manner in order to be introduced as evidence in a criminal proceeding during the prosecutor's direct case.

1. Unduly or Unnecessarily Suggestive

Under New York's Criminal Procedure Law, evidence of a defendant's identification may be utilized in a criminal prosecution only if the administration of the procedure is not unduly or

unnecessarily suggestive. A procedure is unduly or unnecessarily suggestive if it creates a substantial likelihood that the defendant would be singled out for identification. In other words, if there is something about the manner in which the procedure was conducted that influences a viewer to focus upon, or draws attention to the defendant, there is a significant risk that any identification made will be based upon something other than the viewer's memory. Courts will suppress identifications made under these circumstances, and in some instances, preclude in-court identifications of the defendant during the trial.

Photographic identifications may be used to establish probable cause for arrest, introduced into evidence if conducted using a blind or blinded procedure, and, if necessary, may provide a basis for conducting a corporeal lineup. However, if the photographic identification that precedes the lineup is not conducted in accordance with Department procedures that are designed to avoid suggestiveness, the lineup identification may be tainted and both the photographic and line-up identification will be suppressed.

Listed below are some examples of photographic identifications that courts have found to be unduly suggestive:

- A photographic array where defendant was the only one with a neck tattoo.
- Defendant depicted in photo array was the only one wearing a hooded sweatshirt described by victim.
- Only defendant's photograph depicted a height chart suggesting prior police involvement.
- Only one of six photographs resembled defendant in age, weight and face.
- Three individuals in single photograph, suspect circled in red.

Detective Guide Procedure 505-01 (Mug Shot Photographic Identification Procedure) and Detective Guide Procedure 505-03 (Photographic Array Identification Procedure) contain detailed guidelines for properly conducting these types of photographic identifications. These guidelines are designed to prevent an identification procedure from being unduly or unnecessarily suggestive and must be strictly adhered to. Whether the photographic identification involves a photographic array, mug shot viewing or the use of a set book, similar rules on avoiding suggestiveness apply.

Listed below are some of the important considerations and guidelines:

- All photographs used in the procedure must be similar in quality, size, style, and appearance. A suspect's photograph can be obtained from any source that a detective may lawfully access such as the DMV, social media and school pictures. Fillers may also be obtained from public sources with the exception of the DMV. DMV photographs may not be used for fillers. Fillers obtained from sources such as public social media may only be used if the backgrounds, lighting and other aspects of the photo can be altered to eliminate suggestiveness. Black and white photographs should not be mixed with color photographs.

- The individuals depicted in the photographs should be similar in appearance to each other based upon race, sex, facial hair and other identifying features.
- In order to establish uniformity amongst all photographs to be used in the photographic array, the backgrounds may be altered and the images cropped. However, absent unusual circumstances, do not make alterations to the suspect's image. If the suspect has a unique characteristic which is prominent, such as a scar or tattoo, that characteristic should be added to the filler photos rather than removed from the suspect's photo (particularly if the characteristic is part of the description provided by a witness or complaining victim). If the subject's photo contains a feature that is neither permanent nor part of the description, such as jewelry, a hat, or a distinguishing hairstyle (e.g. long dreadlocks, Mohawks, colorful hair), and that feature highlights the suspect thereby making the photo array unduly suggestive, actions should be taken to equalize the appearance of the images.
- The investigator conducting the photographic identification must avoid any suggestion that the suspect is, in fact, depicted in one of the photographs.
- Immediately following a viewer identification, a confidence statement should be elicited by asking the viewer to explain, without using any numbers or percentages, how sure he/she is about the identification. Upon consent of the viewer, the viewer's statements during the identification procedure should be electronically recorded (discussed in greater detail below).

When creating a photographic array or mug shot viewing utilizing the Photo Manager System, the software will help to select photographs that comport with the guidelines discussed above. However, when using set books that have not been created using the Photo Manager System or ECMS, it is especially important to carefully review all photographs in the set book to ensure that the photographs to be viewed by the viewer are appropriate. Set books that contain photographs that are not consistent in quality, style, size and color should not be utilized for identification purposes. Similarly, set books that contain photographs depicting information other than photographic images (i.e. pedigree information, arrest histories, graffiti tags) should not be shown to the viewer for the purpose of identification.

2. Blind and Blinded Procedures

Pursuant to legislation enacted in 2017², the introduction into evidence of an identification resulting from a photographic array procedure is permitted in criminal and juvenile proceedings provided that the photographic array was conducted using a blind or blinded procedure. Failure to conduct a blind or blinded procedure will result in preclusion of testimony regarding the photographic identification procedure during the prosecution's case, but does not result in total suppression of the photographic identification. For example, the prosecution may be able to introduce the evidence of a photographic identification that was not conducted pursuant to a blind or blinded procedure if the defense attorney asks certain questions during cross-examination and

² Criminal Procedure Law § 60.25, 60.30, 710.30; Family Court Act § 343.3, 343.4.

opens the door to that evidence. Nevertheless, a blind or blinded procedure should be conducted regardless of whether a photographic identification is sought for introduction into a criminal or juvenile court proceeding. Using such a procedure avoids inadvertent suggestiveness in the administration of an identification procedure and provides the prosecution with additional admissible evidence to prove the defendant's guilt.

3. Confidence Statements and Electronic Recording of Identification Procedures

In order to further ensure accuracy in viewer identifications, legislation has been enacted that instructed the New York State Department of Criminal Justice Services ("DCJS") to develop guidelines for identification procedures. To that end, DCJS issued guidelines that immediately following a viewer's identification from a photographic array, a confidence statement should be elicited from the viewer. The viewer should not respond using a numerical scale or percentage, but instead should state his or her own level of certainty in his or her own words. Prior to viewing an identification procedure, the viewer should be instructed that he or she will be asked for a confidence statement, to avoid a response that includes numerical scales or percentages, and that the simple request for a confidence statement is not meant to suggest how certain or uncertain the viewer may be. Finally, the viewer should be told in advance that this question is asked of every viewer who makes an identification. Additionally, DCJS guidelines dictate that a viewer's statements during an identification procedure should be electronically recorded, provided the viewer consents and the detective determines that such a recording will not present a safety risk to the viewer.

F. CONCLUSION

The concepts discussed in this bulletin are being emphasized as an update and review of the appropriate techniques to be used during a photographic identification. They also highlight the importance of avoiding certain behaviors that may influence a witness or victim's viewing of photographs for identification purposes. Suggestive conduct by an officer or detective may occur even unintentionally or inadvertently. These procedures should, therefore, be carefully followed. A conviction based on a mistaken identification benefits no one. It results in the guilty perpetrator remaining at liberty, injures the individual who is wrongfully convicted and damages the public's confidence and trust in the criminal justice system.

NOTE: The rules described above apply only to photographic viewings conducted for identification purposes, i.e., a crime has been committed and the suspect and victim or witness are not known to each other. When the suspect and the victim are known to each other, such as in a domestic violence assault, a photographic viewing for identification purposes is not required. Any photographic viewing done in this circumstance is for the purpose of **confirmation**, i.e., (1) determining that the person that has been arrested is the person who has already been identified by the victim or witness, or (2) if the suspect is not yet arrested, that the correct person is taken into custody when found.

Legal Bureau Bulletin Volume 47, Number 4 dated June 2017 is revoked.